Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library
of Congress
Washington, D.C.

In re Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)	Docket No. 21-CRB-0001-PR (2023–2027)

GEO'S REPLY BRIEF TO ORDER 65 ON RATE-SETTING FOR ALL RESTRICTED, LIMITED, AND 37 C.F.R. § 385.2 ELIGIBLE LIMITED DOWNLOADS, ET AL., REQUEST FOR HEARING AND ADD CPI-U COLA

Participant George Johnson ("GEO"), a *pro se* Appellant songwriter, and copyright author respectfully submits his Reply to the Judges' January 5, 2023, *Order 65 Requesting Additional Briefing From Participants*[1] regarding rate-setting activity proposed by GEO in his WDS, and for what appears to be *all* Subpart C Downloads where download *rates have never been set*. This rate-setting includes the rateless "Restricted Download"[2], the 37 C.F.R. § 385.2 "Eligible Limited Download" "stream", and downgraded §385.10 "Limited Download" which still exists *and was promised a rate* by NMPA, HFA, RIAA, RIAA counsel Mr. Englund, and the "older"

[1] https://app.crb.gov/document/download/27413 January 5, 2023, *Order 65 Requesting Additional Briefing From Participants* on "unlimited limited download", pursuant to §385.2.

[2] https://app.crb.gov/document/download/27410 December 30, 2022, Subpart C Final Rule. 87 Fed. Reg. 80448 (Dec. 30, 2022) "Restricted Download" quote from CRB ruling. "Restricted Downloads have been defined as any downloads that are not permanent, including Eligible Limited Downloads. However, past regulations (and seemingly those set forth in the Settlement) do not provide a rate for Restricted Downloads."

versions of The "Parties"[3] in 2001[4], et al., but was just a RIAA *grift,* and to buy time.

Unfortunately, for all American songwriters "subject to" the license with a "limited time" to "secure" their profits, the older Parties and their counsel *intentionally lied to the Copyright Office about* <u>*setting a rate for Limited Downloads*</u> <u>and GEO respectfully requests that empty promise be fulfilled after 22 years</u>, *and* a non-static COLA applied. These changing definitions by counsel are also at issue.

It's amazing these Same Parties, lobbyists, and counsel are *still in control*.

GEO respectfully argues my Article I *and* §106 exclusive rights override the Parties' gaming and hacking of the rate-setting process over the past 25 years, with all their crooked "voluntary settlements", exceptions, and limitations to my works.

GEO filed his Response[5] on January 20th and Corrected version on January 22, 2022 with proposed options to issues *too complicated* to be argued by brief *only*.

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[3] The "Parties" consist of lobbyists National Music Publishers' Association ("NMPA") and Nashville Songwriters Association International ("NSAI,"), who represent the 3 major record labels Universal Music Group ("UMG"), Warner Music Group ("WMG"), and Sony Music Entertainment ("SME") on the one hand, and Amazon.com Services LLC, Apple Inc., Google LLC, Pandora Media, LLC and Spotify USA Inc., also represented by lobbyist the Digital Music Association ("DiMA") (collectively, the "Service Participants" or the "Services") on the other hand — (NMPA, NSAI, RIAA, DiMA, the 3 major record labels and the Service Participants, hereafter, the "Parties").

[4] <u>https://www.copyright.gov/docs/section115/industry_agreement.pdf</u> December 06, 2001 *Joint Statement of The Recording Industry Association of America, Inc., National Music Publishers' Association, Inc. and the Harry fox Agency, Inc.* in the Mechanical and Digital Phonorecord Delivery Compulsory License. Docket No. RM-2007, Page 8.

[5] <u>https://app.crb.gov/document/download/27429</u> GEO's Amended Subpart C Proposal and Response to Order 65 on Rate Setting.

As Your Honors state, that since no rate-setting has *ever* occurred for Restricted Downloads activity, et al[6]., and to GEO the free Limited Download, nor the §385.2 Eligible Limited Download at a lawful download rate (not a streaming rate from a self-dealing "voluntary settlement") GEO respectfully argues that a *de novo* hearing is now required, and preferred by GEO, at Your Honors' discretion.

While Restricted downloads are not permanent, they *are* being used as such.

The real loophole is the "free and unlimited" 385.2 "Eligible Limited Download, where the Parties have systematically devised a scheme via Regulations where this download is *not paid the required 12 cent penny rate* (with a Cost of Living Adjustment ("COLA")), yet this download is *essentially permanent for offline listening, meeting all the practical and legal definitions of a permanent download*.

It is also truly unbelievable to GEO that *an interactive stream rate* was set for an eligible *download*, so that the lawful download penny royalty rate *would never be determined,* since it was intentionally *not* set by The Parties to rob songwriters.

This is also why *de novo* rate-setting is so vitally important here, not only because a.) it is required by statute, *and* that b.) no rate has ever been set for several of these activities and uses, but c.) in the case of the Eligible Limited Download, there are multiple *unpaid uses by the Parties, infringing* on §106 and Article I exclusive rights, while d.) bending §385 to their will by constantly re-writing the regulations and definitions to the Record Company Participants ('RCP")

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[6] Including the Purchased Content Locker Service. Possibly rateless "incidental" DPD's and original Digital Phonorecord Delivery which no rates have ever been set. Promotional too?

and Services' benefit, just to benefit 8 to 12 huge corporations over millions of American songwriters' rights.

An Eligible Limited Download is NOT a "transmission" of a musical work, it's a "download" of a musical work, just as the title says, especially when it's an "offline listen. It's why "Download" is the title. So, this is another word game by counsel, primarily NMPA counsel Pryor Cashman, to hide the fact that §385.2 *is* a free reproduction and distribution of a musical work in violation of §106 due to all the "exceptions and limitations" proposed by the Parties in their self-dealing voluntary settlements over the past 25 years. To make the false argument that this download is not a download, but just a transmission is patently false and must be corrected.

I understand that a "transmission" of a digital phonorecord delivery ("DPD") is now commonplace in the modern §385, but not as a free offline listening download for repeated and endless on demand use, exactly as a paid Permanent Download.

Specifically, GEO alleges §106 infringing §385.2 Eligible Limited Download use by way of free, unlimited "offline listening", amazingly codified as "rate-court precedent" inside the Copyright Act, where end users are "lawfully" allowed to *download for free*. The Services will argue that the Eligible Limited Download is not free, and a rate has been set, *however it's at a static $.00012 cents*, instead of a lawfully established download royalty of 12 cents, and with *no COLA for offline download listens*. GEO prays Your Honors apply the new rate court precedent of COLA adjustments for downloads in Subpart B, and finally establish a Subpart C COLA adjustment and Subpart C download rate.

GEO argues this is "systematic wrongful conduct" by the RCP's and Parties, including RIAA/Mr. Englund's 1998 and 2001 *free* Limited Download "Settlements".

The RIAA, NMPA, DiMA, and Mr. Englund first defined the digital phonorecord delivery or ("DPD") as "incidental", in a scheme to keep it free, and then they later re-defined this incidental DPD as a "Limited Download", another fraud to keep this rate free of charge to them, and to avoid infringement liability. GEO respectfully request Your Honors stop these billions-dollar corporations from continuing to collude to defraud *all* American songwriter and publishers subject to the license, and precisely *what they've done*.

To once again quote Mr. Mazumdar from his Bloomberg Law article in 2017, "**Limited downloads constitute private copies stored on user devices that can be listened to repeatedly after being transmitted. They are deliveries of a phonorecord—DPDs—that clearly implicate the reproduction and distribution rights."** Just because Parties changed the name to "Eligible" is moot.

Ironically, on Page 6 of the *Amended Proposal Concerning Digital Phonorecord Deliver Royalty Rate Adjustments* attached to the December 4, 1998 so-called "Settlement" (*See* additional excerpt below) titled *Amendments to 37 C.F.R. Part 255,* paragraph (b), Mr. Englund, NMPA and the RIAA declare in this vague and anti-songwriter Settlement agreement that "*no precedential effect* shall be given to the royalty rate under this paragraph or any period prior to the period as to which the royalty rates are to be established *in such future proceeding*."

Yet all this 1998 Agreement *seems to contain is future precedent*, even establishing the *de novo* precedent, while this self-dealing agreement goes on to *demand precedent* at every turn, *with no rate for Limited Downloads planned out for 10 years*, as seen in a later 2001 filing.

> In any future proceeding under 17 U.S.C. § 115(c)(3)(C) or (D), the royalty rates payable for a compulsory license for digital phonorecord deliveries in general shall be established de novo, and no precedential effect shall be given to the royalty rate payable under this paragraph for any period prior to the period as to which the royalty rates are to be established in such future proceeding.

Furthermore, a COLA has also never been set for a Limited Download, and possibly more importantly, the §385.2 Eligible Limited Download — now impersonating an Eligible Interactive Stream to unlawfully lower the 12 cents payment to songwriters to $.00012 with no COLA. GEO respectfully submits that Your Honors must set a COLA indexing for §385.2, primarily due to the rate court precedent of the new Subpart B download COLA, whether by hearing, more briefings, or *sua sponte*.

One of GEO's primary arguments is that the Limited Download *was always intended to be used as a free download and a rate never set at Mr. Englund and the RIAA promised songwriters in 2001.* However, the Eligible Limited Download *is the product of that strategy,* and is now effectively being used as a paid Permanent Download in every way, with no proper value, or lawful 12 cent download payment.

This is just one more exception and limitation to my exclusive rights.

Moreover, this is the RCP's intentionally sabotaging my rightful sale.

Some of the most amazingly *vague* language, *and one of the worst agreements I have ever seen for songwriters* is this December 6, 2001[7], agreement from the RIAA, Mr. Englund, NMPA, et al, specifically Page 8 of the "terms of agreement".

The coordination and collusion it took to kick the "zero rate" download down the road *to use downloads for free as long as they could*, and to *help their licensor friends get their businesses off the ground,* all at the expense of songwriters, is a complete abuse of the Copyright Office rate-setting process, still *destroying* songwriters' profits and incomes here in 2023, and why a hearing and litigation is most likely necessary.

Kicking the copyright can down the road again is why we are here and GEO prays a full vetting of all these schemes by the Parties for 25 years to not pay songwriters their lawful, long established, and vital download royalties as the *de minimus* streaming rate or "zero rate" must be rectified. We §115 copyright authors *have never recovered* from 1998 and 2001, and 2006 *Phonorecords I*, and we are still waiting for that "promised" Limited Download royalty rate, and not an Interactive or Eligible Interactive Streaming rate *that substitutes for a 12 cent Download use*.

Furthermore, for the grifter Parties to claim in their 2001 "Settlement" they were "encouraging songwriting by providing for the payment of fair royalty to songwriters", but they end up intentionally ensuring *no rate* for 12 to 17 years, is pure fraud.

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[7] https://www.copyright.gov/docs/section115/industry_agreement.pdf December 06, 2001

Authors' downloads are given away, and our "fair royalty" for Limited Download is only $.00012 in value, not 12 cents? Talk about a bait and switch

25 years of no Subpart C download rate-setting for free downloads used by the Parties, is neither encouraging to songwriters, nor is a free download a "payment" or a "fair royalty".

For these Parties to then claim that their self-dealing "framework" is for "encouraging songwriting" *by not paying songwriters, and never setting a rate,* **"while ensuring that services can launch and operate in the interim"** is pure fraud, and why we are here today. Their "voluntary settlements" are not "Congress encouraging settlements", but "legal" copyright infringement inside the Copyright Act. GEO prays Your Honors will finally set a fair and truly reasonable rate since free and $.00012 per-download is *not reasonable* for these activities.

The RCP's and *our own lobbyists clearly betrayed* every §114 and §115 music creator in 2001, and we ask that fair rates finally be set for these copyright uses.

> "The Agreement provides a framework to establish fair royalty rates, thereby **encouraging songwriting by providing for the payment of a fair royalty** to songwriters for their creative efforts, **while ensuring that services can launch and operate in the interim. Although the Agreement does not establish a royalty rate for** On-Demand Streams **or Limited Downloads, the parties have committed to engage in good faith negotiations to arrive at such a rate (or rates). If negotiations fail, an applicable rate (or rates) will be established by a CARP convened by the Copyright Office. In the interim, however, the Agreement allows licensees to launch their services now and pay the royalties due on a retroactive basis once rates are established. (bold added)**

> The Agreement represents the type of marketplace solution that Congress has urged to resolve these business and legal issues."[8]

Yet for 25 years these Parties have NOT established *one fair or market rate royalty in any of there proposed self-dealing "voluntary settlements".*

Furthermore, when did the Parties ever "provide for the payment" of a fair royalty for a Limited Download as they promised in "good faith"?

Never.

These 1998 and 2001 Settlements were nothing but cons and lies by the RCPs to *defraud their competitor songwriters and publishers,* and *their own songwriters at the 3 major publishers*, because they knew no songwriter would ever oppose their Settlement, much less ever be a Participant, because the RCP's controlled the game back then, and have, until now. This is why abolishing the compulsory license has become such a popular issue today to many industry veterans since it's a natural "equal and opposite reaction" to the RCP's flagrant abuse of the copyright rate-setting process and their brazen theft of *all* songwriters in plain sight over the past 25 years.

For the Parties to falsely claim that the "lack of a rate" is "not inconsistent with current industry practice", is just another excuse by counsel and the Parties to literally keep stealing songwriter download royalties *by not setting rates here*, nor adding a reasonable and precedential COLA adjustment, while continuing *to*

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[8] https://www.copyright.gov/docs/section115/industry_agreement.pdf December 06, 2001 *Joint Statement of The Recording Industry Association of America, Inc., National Music Publishers' Association, Inc. and the Harry fox Agency, Inc.* in the Mechanical and Digital Phonorecord Delivery Compulsory License. Docket No. RM-2007, Page 8.

intentionally sabotage our download sales, just as the Parties have intentionally sabotaged interactive streaming rates at $.00012 per stream for decades, which is unsustainable.

As Your Honors know, GEO does not consider $.00012 a reasonable rate for streaming and not within the "zone of reasonableness" since nobody can survive on $.00012 per-hour, per-day, or per-song.

GEO understands a limited Promotional use for 30 days, or using a temporary buffer download to stop dropped transmissions caused by a poor signal, et al., but what counsel has done here for 25 years, by not setting rates for the Limited Download, now Eligible Limited Downloads, is 100% pre-meditated and copyright infringement to not pay songwriters anything, ever.

So, all these activities *are* activities that are currently being utilized for free by the Parties, and therefore *do exist in the marketplace, but for free by "voluntary agreement" and re-writing §385 Regulations.*

This is why GEO respectfully submits that a hearing is necessary to adjudicate all of these rates, and for current activity *that has never been set* nor adjudicated ever, all directly due to the chicanery of the RCP's and other Parties.

So, when the Parties attempt to argue in their Response that free downloads are industry standard since *Phonorecords I*, they made them free. The Parties even freely admit that all they colluded and unlawfully price-fixed ALL their competitors when they state; "The Settled Participants reasonably agreed to carry over that

same scope in resolving this proceeding". Well, of course they agreed to carry over a "zero rate" for §385.2, et al.

> "Second, the lack of a rate for certain Restricted Downloads that are not Eligible Limited Downloads (for offerings other than locker services) that Copyright Owners raised and that the Judges cited has been an aspect of the compulsory mechanical license since Phonorecords I. See 37 C.F.R. § 385.11 (2010) (definition of "limited download"); 37 C.F.R. §§ 385.11 (definition of "limited download"), 385.21 (2014) (definitions of "restricted download" and "limited download"); 37 C.F.R. § 385.2 (2020) (definitions of "Restricted Download" and "Eligible Limited Download"). The Settled Participants reasonably agreed to carry over that same scope in resolving this proceeding."

There is nothing reasonable about these uncontested carry overs, especially when many of their destructive voluntary settlements are now considered CRB rate court precedent.

For example, as mentioned above, here these corrupt Parties guaranteed themselves a 10 years window to infringe on digital phonorecord deliveries till 2008!

> "The procedures specified in 17 U.S.C. § 115(c)(3)(C) shall be repeated in 1999, 2001, 2003 and 2006 so as to determine the applicable rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2001, 2003, 2005 and 2008. The procedures specified in 17 U.S.C. § 115(c)(3)(D) shall be repeated, in the absence of license agreements negotiated under 17 U.S.C. g 115(c)(3)(B) and (C), upon the filing of a petition in accordance with 17 U.S.C. g 803(a)(1), in 2000, 2002, 2004 and 2007 so as to determine new rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2001, 2003, 2005 and 2008. Thereafter, the procedures specified in 17 U.S.C. § 115(c)(3)(C) and (D) shall be repeated in each fifth calendar year. Notwithstanding the foregoing, different years for the repeating of such proceedings may be determined in accordance with 17 U.S.C. g 115(c)(3)(C) and (D)."

Yet they also claim that "no precedent should be set" from our proposals, while all they do is demand their fraudulent voluntary Settlements become precedent, to not pay competitor songwriters and their own which is sickening.

GEO proposes a non-static rate, and a CPI-U COLA indexing for all relevant Subpart C Downloads, which is now rate court precedent and a good reason why COLA indexing must be applied to all or most of the Subpart C downloads, including the §385.2 Eligible Limited Download, and possibly the Promotional Download, or Restricted in general.

While the Parties hate to hear about buying records, why is an end user entitled to hear a song without buying or paying for the copyright? Your Honors remember having to go to the record store in the 1970's to buy a vinyl album, 8-track tape, cassette tape, and then the CD, **just to hear the song one time** "on demand". Why is that not still the law? What changed that makes an access model trump a tried and true "industry standard" sales model for almost 100 years?

Why are sales not considered industry standard, considering that was the purpose of the 1909 compulsory license, sales, not free access if you *only pay the Licensee*, but then stiff the Licensor/only supplier at a "zero rate"?

While all the kids think "music is free" and are entitled to hear music like it's running water at their parents house, end users used to drive to a store and **wait** till they *even got to hear the song 1 time*, which is relevant to this rate proceeding. I understand the convenience part to streaming, but that is all the subscription fee pays for, access and convenience, not the copyrights.

$.00012 per stream for a §385.2 download is not paying for the copyright, and just a technique to avoid a lawful payment to songwriters and competitor publishers

by the corrupt Parties to fuel their access model and their profits, at the expense of all U.S. and global creators.

Then in *Phonorecords I* RIAA and RCPs once again got away with establishing NO RATE for the Limited Download in "good faith" negotiations so that an imaginary rate would be established by CARP someday? "In the interim, however, the Agreement allows licensees to launch their services now and pay the royalties due on a retroactive basis once rates are established."

So, let us launch now, raise billions, and pay songwriters later retroactively at a rate we refuse to propose?

This entire history of the voluntary settlements is pure cronyism by the RIAA, RCP's, and DiMA that has destroyed billions of sales for millions of songs, stolen from American songwriter's income and profits for over 22 years. We pray the CRB will reverse this grave and longstanding injustice. This is nothing more than incremental and intentional mission creep over 22 to 25 years of the Limited and now Eligible Download, et al.

Since the Act states that a rate and terms set in a subsequent Phonorecords proceeding "shall be retroactive to the inception of activity," See 17 U.S.C. § 803(d)(2)(B). GEO prays Your Honors will finally set reasonable rates for all or some of the above mentioned activity and for activity that has never had a rate set, like Restricted Downloads in general — setting current, *de novo*, market-rates for the Eligible and other downloads that have been suppressed by the Parties for 25 years.

As mentioned above, there are several more Settlement agreements, like the 2006 *Phonorecords I* Settlement, that also kicks the free royalty can down the road, never setting rates for the Limited Download as promised by the Parties, in addition to all the other flawed rate setting activity via "voluntary settlements" for 25 years, and all the endless self-dealing definition changes made to this day.

As Spotify[9] and other "rig-tech" lay off 6% of their workforce, as Participant Google has just done as well, their empty promises and false narrative of endless upward growth is another "big lie" that must be weighed in their flawed Subpart C Settlement, and past "zero rate" activity *that was never determined in 25 years*.

CONCLUSION

Since there is not enough room or time to argue all the good reasons and good cause in this brief, GEO respectfully submits Your Honors schedule a hearing, or take further action, for the above mentioned activities to allow the evidence and legal arguments necessary to set the proper and reasonable rates *all* American songwriters and music publishers deserve and are lawfully entitled.

GEO respectfully submits Your Honors consider converting all Restricted Downloads and §385.2 Eligible Limited Downloads to full Paid Permanent Downloads like Subpart B, or simply repeal the §385.2 Eligible Limited Download

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[9] https://www.msn.com/en-us/money/companies/spotify-cuts-6percent-of-its-workforce-content-chief-departs/ar-AA16Es2v January 23, 2023, Spotify cuts 6% of its workforce — read the memo CEO Daniel Ek sent to staff. MSN.

in exchange for a full Paid Permanent Download for all Offline Listening Downloads, Restricted, and Eligible Limited Downloads.

De novo proceedings and first time rate setting, including COLA indexed, non-static rates for all Subpart C Download configurations is vital for all American songwriters and music publishers subject to the compulsory license.

Respectfully,

By: */s/ George D. Johnson*

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Friday, January 27, 2023

Proof of Delivery

I hereby certify that on Friday, January 27, 2023, I provided a true and correct copy of the GEO's Reply Brief to Order 65 On Rate Setting for All Restricted, Limited, and 385 Eligible Limited Downloads, et al., Request for Hearing and Add CPI-U COLA to the following:

Joint Record Company Participants, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via E-Service at benjamin.marks@weil.com

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Google LLC, represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Copyright Owners, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

Spotify USA Inc., represented by Joseph Wetzel, served via E-Service at joe.wetzel@lw.com

Amazon.com Services LLC, represented by Joshua D Branson, served via E-Service at jbranson@kellogghansen.com

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

Apple Inc., represented by Mary C Mazzello, served via E-Service at mary.mazzello@kirkland.com

Signed: /s/ George D Johnson